CapLaw
SWISS CAPITAL MARKETS LAW

No. 2/2017

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The Extraterritorial Reach of the New EU Share Trading Obligation

Reference: CapLaw-2017-15

The new Market in Financial Instruments Regulation (MiFIR) will introduce a share trading obligation which requires EU investment firms to trade shares on an EU trading venue, an EU systemic internaliser or on an equivalent third country exchange only. Should the Swiss legal framework not be considered equivalent to the EU regulation as of the date of the launch of MiFID II/MiFIR (3 January 2018), EU investment firms would be required to trade dual-listed shares outside of Switzerland, even if the deepest pool of liquidity is in Switzerland. This article briefly describes the EU equivalence regimes in general, the requirements and effects of the relevant equivalence provision with regard to the share trading obligation, as well as its effects on Swiss trading venues.

By Marco Toni / Lea Hungerbühler

1) Introduction

In order to enhance transparency in the EU stock market, article 23 MiFIR will introduce a trading obligation for shares. Trades by EU investment firms in shares traded on an EU trading venue must be executed (i) on an EU regulated market or multilateral trading facility (MTF), (ii) with an EU systematic internaliser (SI), or (iii) on a third country trading venue assessed as equivalent in accordance with article 25(4) of the Market in Financial Instruments Directive (MiFID II). The share trading obligation only applies to EU investment firms, *i.e.* firms regulated by MiFID II, but not to other entities such as alternative investment fund managers (AIFMs) or managers of UCITS funds (Undertakings for Collective Investments in Transferable Securities).

Each EU trading venue will benefit from a passport for the purpose of the share trading obligation. For third country trading venues like SIX Swiss Exchange AG (SIX), there is a possibility to get an equivalence recognition by the EU, which would allow EU investment firms to execute share trades on the respective third country trading venue as well.

2) Different concepts of equivalence

Various passporting possibilities ensure a level playing field among financial services providers located within the EU. For market participants outside of the EU, the EU established a variety of *third country regimes.* Most of these regimes are based on an equivalence decision, *i.e.* a decision by the EU Commission (Commission) which determines that the legal regime in the respective third country is equivalent to the one in the EU in the particular area of regulation.

Until today, the EU has taken 212 equivalence decisions for the benefit of various third countries. However, equivalence can by no means be understood as one single particular concept. There is a broad array of several dozens of equivalence provisions in EU financial markets regulations and each equivalence provision has its own peculiarities. The most important common feature of all equivalence provisions in EU law is the fact that a particular authority has the task to compare the legal and supervisory framework of a third country with the one of the EU. Based on such assessment, the equivalence of a third country's legal framework will be recognized (or not). Of course, there is also a political and, hence, unpredictable component in the assessment and decision procedure.

3) Equivalence assessment for the purpose of the new EU share trading obligation

a) Requirements and procedure for equivalence

With regard to granting equivalence under the new share trading obligation, article 23 MiFIR refers to article 25(4) MiFID II. According to article 25(4)(a) MiFID II, the legal and supervisory framework of a third country must be equivalent to the requirements applicable to EU regulated markets resulting from (i) the Market Abuse Regulation, (ii) MiFID II, (iii) MiFIR, and (iv) the Transparency Directive. In particular, third country trading venues need to be subject to authorization and effective supervision and enforcement on an ongoing basis, they must have clear and transparent rules regarding admission to trading, security issuers have to be subject to periodic and ongoing information requirements, and market transparency and integrity need to be ensured.

The most onerous aspect of this equivalence procedure is the initiation of the equivalence assessment. According to article 25(4) MiFID II, the competent authority of a member state may request the adoption of an equivalence decision regarding a third country by the Commission. Before a decision is taken, it will be discussed by the Expert Group of the European Securities Committee (EGESC). The requesting national authority has to indicate why it considers the respective third country as equivalent and provide the relevant information to demonstrate equivalence. This procedure is similar to the one laid down in article 4 of the Prospectus Directive – interestingly enough, there has been no single equivalence decision under this provision of the Prospectus Directive so far.

There are several questions in connection with the equivalence assessment under article 23 MiFIR/article 25(4) MiFID II that cannot be answered today:

– It is currently unclear whether there will be two separate equivalence decisions for article 25 MiFID II and article 23 MiFIR or a combined one.

– The wording of article 25(4) MiFID II ("third country regulated markets") seems to provide the Commission with an equivalence decision mandate for regulated markets only. It remains to be seen whether in fact only regulated markets will benefit from the equivalence decision, and MTFs and SIs located in third countries would remain expelled. Interestingly, the parallel provision for the trading obligation for derivatives (article 28 MiFIR) explicitly mentions that there might be separate decisions for the different types of trading venues.

– It is uncertain whether equivalence decisions by the Commission will be taken with regard to certain third countries in their entirety or specific local trading venues only.

b) Timing

The share trading obligation implemented by MiFID II/MiFIR will be applicable as of 3 January 2018 (in contrast to the trading obligation for derivatives, which will be applicable upon instruction by the European Securities Markets Authority (ESMA)).

Due to the cumbersome equivalence procedure requiring a specific request submitted by a national authority, it is currently unclear whether and when such equivalence decisions will be taken. There have been indications that the EGESC conducted a consultation regarding the countries which should be prioritized, pointing to the intention to have a first set of equivalence decisions in place at the beginning of 2018. Countries so chosen shall have the possibility to submit their equivalence analysis by May 2017. Between June and October 2017, the Commission would conduct its evaluations and issue a decision which would then be published in the official journal in December 2017.

4) Other equivalence assessments of third country trading venues

Article 19 MiFID I contained a similar equivalence provision to article 25(4) MiFID II. However, under article 19 MiFID I, no decision was taken by the Commission.

Article 28 MiFIR includes a trading obligation for derivatives. In contrast to article 23 MiFIR, the trading obligation for derivatives will only apply once ESMA has decided which classes of derivatives are subject to the trading obligation. Accordingly, there is less time pressure for the issuance of equivalence decisions in this regard.

Article 2a European Market Infrastructure Regulation (EMIR) contains a provision which qualifies derivatives traded on equivalent third country trading venues as exchange traded instead of over-the-counter (OTC) traded for EU law purposes. Various third countries were assessed as equivalent for this purpose, but not Switzerland.

According to article 25 EMIR, a third country central counterparty (CCP) may only provide clearing services for OTC derivatives in the EU where the third country regulation

has been determined as equivalent. The equivalence decision regarding the Swiss regulation for this purpose was issued in November 2015.

Finally, the Capital Requirements Regulation (CRR) contains an equivalence provision regarding third country exchanges (article 107). The beneficiaries of this equivalence decision are mainly EU banks, since they may treat exposures to third country exchanges similar as exposures to EU exchanges. Switzerland has not yet been considered as equivalent for this purpose.

5) Will Switzerland be deemed equivalent under the new EU share trading obligation?

Apparently, Switzerland is among the third countries listed in the first group of equivalence assessments (besides the US, Japan, Canada, Australia, Korea, Hong Kong, Singapore and certain Latin American countries). In general, the Commission does not only consider technical aspects when deciding upon equivalence. Instead, also aspects such as financial stability, investor protection, the integration of EU financial markets and regulatory convergence are taken into account. In the end, the Commission has full discretion on whether or not to pass a positive equivalence decision – this is a purely unilateral and discretionary act by the EU.

Therefore, it remains to be seen whether the issues which are generally considered as critical in an international comparison, such as the self-regulation system of the Swiss exchanges, will be a hurdle. The Financial Market Infrastructure Act (FMIA) filled some gaps between the Swiss and the EU regulation and lead to a positive equivalence decision by the Commission with regard to CCPs. Unfortunately, the Commission has not taken any positive equivalence decision with regard to Swiss trading venues yet, while at the same time various other third countries were deemed equivalent, be it under EMIR (article 2a) or CRR (article 107). The last batch of decisions was published in December 2016, *i.e.* at a point in time when the FMIA was already in force. Therefore, it cannot be taken for granted that the Swiss regulation will be assessed as equivalent by the Commission for the purpose of the share trading obligation.

6) Challenges for market participants in case of an absence of an equivalence decision under the new EU share trading obligation

a) In general

A delay by the Commission in rendering equivalence decisions under the new EU share trading obligation will cause a variety of issues for the market participants.

In particular, EU investment firms might be required to execute share trades outside the jurisdiction with the deepest pool of liquidity. Generally, low liquidity leads to wider spreads, resulting in worse prices. In particular, but not exclusively, dual-listed shares

will be affected. An example is Apple, Inc.: Apple's deepest pool of share trade liquidity is outside the EU, but its shares are also traded in the EU, at a significantly lower level of liquidity. If an EU investment firm undertakes a trade in Apple shares, either directly as arranger/transmitter or via booking arrangements, it will have to execute it on an EU trading venue, even though the price might be more favorable on a US exchange. Such discrepancies might cause market disruption, especially since those firms which are not bound by the trading obligation (*e.g.* AIFMs) may make use of deeper liquidity pools available at trading venues outside the EU.

In addition to the economic disadvantage, the constellation with different market conditions in- and outside the EU also creates an issue with regard to the EU investment firms' obligation of *best execution*. This principle (article 27 MiFID II) obliges EU investment firms to execute orders on terms most favorable to the client, taking into account aspects like price, costs and speed. Hence, an investment firm might have to decide whether it infringes the best execution principle or the share trading obligation.

b) For Swiss trading venues

A large part of the share trading activities on SIX derives from EU investment firms. According to SIX, a substantial portion of shares traded on its trading venue would be affected by the lack of an equivalence decision. If the trading obligation cannot be fulfilled by trading on a Swiss trading venue (because Switzerland is not considered equivalent), EU investment firms have to switch to other trading venues which are recognized for the purpose of the share trading obligation. Therefore, the equivalence decision under article 23 MiFIR is crucial for Swiss trading venues.

Apart from Swiss trading venues, also Swiss branches of EU investment firms might be affected. Based on a strict reading of article 23 MiFIR, a trade undertaken by a third country branch of an EU investment firm might also fall under the share trading obligation as it is, eventually, a trade by the EU parent. Consequently, such trade could not be executed on a non-equivalent third country trading venue.

7) Conclusion

A positive equivalence decision under article 23 MiFIR in connection with article 25(4) MiFID II is of utmost importance for the Swiss trading venues. In case of a lack of equivalence, EU investment firms will be forced to execute trades in dual-listed stock on another trading venue outside of Switzerland. This potential consequence would be harmful to the Swiss financial market in its entirety, since a strong share trading venue with an international circle of participants is crucial for an international financial center like Switzerland.

We believe that the introduction of the FMIA will increase the probability of a positive equivalence assessment by the Commission regarding Swiss trading venues. Even though various aspects of the equivalence procedure are still unclear and, furthermore, technical equivalence does not ensure a positive decision on a political level, current signs are promising and Swiss exchanges could be among the first third country trading venues which will be considered equivalent for the purpose of the share trading obligation.

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Current market practice of subsequent prospectus review for bonds and derivatives can be maintained under article 53 FinSA

Reference: CapLaw-2017-16

Article 53(1) FinSA introduces a pre-review of prospectuses by a reviewing body, while article 53(2) FinSA allows the Federal Council to provide for exemptions. The Federal Council should continue to allow subsequent reviews substantially in the same way as the regulatory board allows provisional trading. The confirmation pursuant to article 53(2) FinSA is addressed to the reviewing body and confirms formal completeness against the prospectus content lists. Only administrative consequences imposed by FINMA are attached to an incorrect confirmation.

By Matthias Courvoisier

According to article 53(2) FinSA (draft Financial Services Act), the Federal Council may designate types of securities for which the review of the prospectus may take place subsequent to publication, provided a bank subject to the Banking Act or a securities firm subject to the FinIA (draft Financial Institutions Act) confirms that at the time of publication the most important information on the issuer and the securities are available.

1) Securities that should profit from an exemption under article 53(2) FinSA

Today, prospectuses are formally reviewed by SIX Exchange Regulation. They check that the prospectus addresses the topics according to the applicable prospectus content list. The review is a condition to listing, not to the public offer. For certain types of securities, exemptions from the review prior to the admission to trading apply. For the admission of bonds, convertibles, and derivatives to provisional trading, the stock

exchange only requires an application by a recognized representative. The application describes the securities and contains an assurance that all listing requirements are met, the securities are structured in a way previously approved by the regulatory board and a listing application will follow. The listing prospectus needs to be published at the time of listing. The prospectus may be required earlier for the offering.

These rules allow to issue securities faster than with a pre-review. They enable issuers to react on changing market conditions swiftly, to grab opportunities and to limit risks from negative events. Derivative issuers can implement their ideas faster to react on customer demand. For other securities no exemption is admissible. This differentiation between the different securities is justified: Bonds are generally less risky than equity securities and less dependent on the performance of the issuer. In case of derivatives, the risk depends on the structure of the product and the underlying. The underlying needs to have a publicly accessible market price created on a regular basis. The structure of the bond or the derivative needs to be of a type previously approved by the regulatory board. Thus, also without pre-review the relevant risks are known to the regulatory board. Also, in case of a first time issuer, the stock exchange must first approve the issuer before a provisional admission is possible. This allows to consider whether in the specific case a prospectus pre-review should be requested.

The provisional admission to trading is only a small risk for investors. First, the prospectus review is a mere formal completeness review and has therefore only a small protective effect. Second, the recognized representative needs to confirm that the conditions for listing are met. That means that the prospectus, irrespective of any obligation to offer the securities only with a prospectus, must be available at the time of the application for provisional trading and must formally meet the requirements of the stock exchange. An incorrect confirmation of the recognized representative is a violation of the listing rules and may be sanctioned. Also, if the listing application is not filed within two months or is rejected, the recognized representative may be fined or excluded from filing for provisional trading for up to three years, provided its behavior amounts to the violation of important professional duties. These sanctions ensure protection of the market.

Once in force, article 53(1) FinSA will require the reviewing body to check that the prospectus is complete, coherent and understandable. The legislator justifies the more extended pre-review only with the argument that this is in line with EU law. Experience shows that the practice of the EU supervising authorities varies substantially across countries. Such practice thus gives little guidance for interpreting article 53(1) FinSA. Since the reviewing body does not perform a due diligence on the issuer and the security and the review time shall remain short, the completeness review does not extend to the substance of the prospectus. It remains a formal completeness review. The coherence review focuses on avoiding contradictions within the prospectus as set out

in the dispatch to the FinSA. The understandability review will be limited to the question whether the prospectus can be understood by a professional investor familiar with the security and the industry at hand. Ultimately, the review is a formal completeness check as today, enhanced by a review based on the logic within the text (coherence) and based on whether the mere text makes sense to the (professional) investor (understandability).

Such review gives little additional protection to investors. There is thus no reason why bonds, convertibles, and derivatives should not be captured by the exemptions of article 53(2) FinSA in the same way as they may be admitted to provisional trading without previous prospectus review. As today, it is justified to require that the structure of the security be one previously approved. Thereby one must be allowed to rely on the experience of the stock exchange before the entering into force of the FinSA, and let the reviewing body set up a list of accepted structures. It must however not matter whether the issuer is a first time issuer or not because the review of the issuer is not a subject of the review performed by the reviewing body. The stock exchange remains free to require a general first time issuer review for its own purposes. For a derivative one should request that the underlying of the derivative be traded with regularly resulting publicly accessible market prices. The reason is that a derivative on a non-traded underlying can only be described by explaining the underlying and the influencing factors in detail. Also, only in this way an indirect public offer of a non-traded underlying through a derivative may be prevented. This justifies a pre-review to make sure that such product is at least coherent and understandable. Regular trading and publicly known prices of the underlying should also be a requirement where the value of a bond is dependent on the value of another security as in case of convertible bonds. Since the value of high yield bonds, *i.e.* bonds below investment grade, are also dependent on the issuer's business and may at least in riskier cases be modelled as derivatives of the issuer's equity, it is justified to require for high yield bonds that the issuer's equity be traded in the same way.

A mere subsequent review for equity securities or exchange traded products has never been market practice and so there is not sufficient justification to allow a mere subsequent review for these other securities.

2) Confirmation under article 53(2) FinSA

Article 53(2) FinSA requires that a bank or a securities firm confirms that at the time of the prospectus publication the most important information on the issuer and the securities is available. That provision leaves open a number of questions:

The first question is what the content of such confirmation is. Article 53(2) FinSA does not exempt from the prospectus requirement. According to article 42(1) (a) and (b) FinSA, the prospectus must contain certain information on the issuer and the securities.

The detailed content will be defined in an ordinance of the Federal Council based on article 48(c) FinSA. Thus, FinSA and the corresponding ordinance define the information that must be available at the time of the prospectus publication. The reference of article 53(2) FinSA to the most important information must therefore be a subset of that information, without there being any hint what kind of subset that could be. Article 53(2) FinSA could however have a broader meaning by capturing information not explicitly mentioned as minimum content of the prospectus, but being required under the general rule of article 42(1) FinSA that the prospectus needs to contain all information essential for an investor's decision. However, the confirmation in article 53(2) FinSA is a mere (temporary) substitute to the review under article 53(1) FinSA. It can therefore not have a further scope than such review, which is, with respect to completeness, a mere formal review against the content lists. Therefore, the confirmation pursuant to article 53(2) FinSA is only a confirmation that the prospectus contains the (most important) information on the issuer and the securities as required by the prospectus lists to be promulgated under article 48(c) FinSA. The reference to the 'most important' information may be practically relevant whenever an exception under article 43(b) FinSA needs to be applied for. The mere formal test is appropriate in view of article 53(1) FinSA and the confirmations provided today by recognized representatives to the regulatory board to obtain approval for provisional trading.

The second question is who the addressee of the confirmation is. The preliminary draft required the bank or securities firm to guarantee the availability of the respective information. This was not introduced into the draft legislation which requires a confirmation only. A guarantee would have been in favor of investors, but not a confirmation. Therefore, the reviewing body is the addressee. That is in line with current practice of the recognized representative providing its confirmation to the regulatory board and with article 42(5) FinSA, which only requires the prospectus to mention that it has not been reviewed yet, but not to refer to the confirmation. Also investors' protection does not require a confirmation addressed to investors, because any wrong confirmation may have supervisory consequences. A bank or a securities firm has a high incentive to issue truthful confirmations. This makes apparent the true purpose of article 53(2) FinSA, which is not to ensure that there is someone liable for a wrong confirmation, but rather that public offerings of securities with mere subsequent reviews are accompanied by banks or securities firms.

The third question is what the consequences of an incorrect confirmation are. The confirmation is not part of the prospectus, so that no prospectus liability is attached to the confirmation. The penal provisions of FinSA do not sanction incorrect confirmations. Only article 90 FinSA gives the supervisory authority of the bank or the securities firm the power to take measures to prevent breaches or to remove their effect. FINMA could *e.g.* order a bank coordinating the issuance of a bond to stop the offering in case of a wrong confirmation.

The fourth question is on what basis a bank or securities firm should give the confirmation. The confirmation is more limited than what a recognized representative has to confirm today to the regulatory board. Therefore, there is no need to enhance compliance procedures. If the bank is drafting the prospectus as in many straight bond issues, it will be the task of those involved to establish a rule check based on which the confirmation can be issued. If the bank does not have the lead in the drafting, as is the case for convertibles and high yield bonds, the bank should ask the legal counsels involved to provide a rule check and to give the very same confirmation in their technical opinion, which is already marked practice. There is no requirement that the banks or securities firms establish the rule check by themselves. Without violating any duty, this may be delegated to outside counsels. One may expect that a counsel qualified to draft a prospectus is also qualified to issue an opinion on the completeness against a content list.

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New Regulatory Guidelines on Corporate Governance for Banks, Securities Dealers and Financial Groups/ Conglomerates (FINMA Circular 2017/1)

Reference: CapLaw-2017-17

On 1 November 2016, FINMA published its new circular 2017/1 on "Corporate governance – banks" streamlining the regulatory framework on corporate governance for banks, securities dealers, financial groups and conglomerates by defining partially revised minimum requirements and underlying principles. The new circular consolidates and replaces three former FINMA circulars and addresses the experiences made in the financial crisis as well as the revised international standards. The most significant changes pertain to i) FINMA's commitment to a more principle based approach and consistent application of the principle of proportionality, ii) the introduction of provisions for the audit and risk committee of the governing body as well as iii) the possibility to delegate the internal audit function to another unregulated group company, provided such group company fulfills certain minimum requirements regarding capabilities and resources. The new circular will enter into force on 1 July 2017.

By Peter Ch. Hsu / Sandro Fehlmann

1) Introduction

On 1 November 2016, FINMA published its new Circular 2017/1 "Corporate governance – banks" (Circular 17/1) streamlining the regulatory framework on corporate governance for banks, securities dealers, financial groups and (bank or securities dealer dominated) conglomerates (collectively referred to as Banks) by i) consolidating

the currently applicable guidelines outlined in various circulars and FAQs and ii) partially revising the minimum requirements as well as the underlying principles. Circular 17/1 will enter into force on 1 July 2017. Concurrently, FINMA also revised its circulars 2008/21 on "Operational risks – banks" and 2010/1 on "Remuneration schemes", which will both enter into force on 1 July 2017 as well (summary discussion on these to follow in a separate CapLaw publication).

Circular 17/1 remains to a large extent in line with the currently applicable FINMA guidance (and the draft circular published on 1 March 2016), except for a number of important changes in specific areas, which will be the focus of this article.

2) Circular 17/1 on Corporate Governance for Banks

a) Overview

Circular 17/1 consolidates the supervisory law requirements relating to corporate governance, internal control systems and risk management for Banks that were previously scattered between two FINMA circulars: i) circular 2008/24 "Supervision and internal control – banks" and ii) circular 2008/21 "Operational risks – banks" as well as the FAQ on the Governing Body (*Oberleitungsorgan*).

Circular 17/1 will supersede circular 2008/24 and the FAQ which currently regulates corporate governance aspects for banks and securities dealers. Circular 2008/24 has not been materially amended since its implementation in 2006. Therefore, the circular does not yet reflect lessons learned from the financial crisis. Furthermore, international standard setters such as the Basel Committee on Banking Supervision (BCBS) adjusted their guidelines in the meantime to implement a standard for a modern corporate governance and efficient risk management (*e.g.* the BCBS Guidelines on Corporate governance principles for banks dated July 2015 available under http://www.bis.org/bcbs). In addition, the International Monetary Fund (IMF) issued in its Financial Sector Assessment Programm of 2014 recommendations on capitalization and corporate governance (see https://www.imf.org). In Circular 17/1, FINMA addresses these developments, completing it with additional risk management aspects demonstrating FINMA's increased focus on a modern corporate governance as well as an adequate and efficient internal control system. Apart from international developments, this strengthened focus on risk management results from FINMA's recent supervisory practice showing that operational risks in banking have become more diverse.

At its core, Circular 17/1 includes provisions relating to various corporate governance aspects such as governing and management bodies, risk management, the internal control system and internal audit. The circular consistently reflects the concept of principle-based regulation. However, FINMA explicitly acknowledged that corporate governance and risk management are regulatory topics that may not be adequately

addressed by a "one size fits all"-approach (explanatory report dated 1 March 2016, p. 9). Consequently, the new circular aims to leave room for institutions to implement the requirements on a case-by-case basis, *i.e.* considering their different business models and the risks associated therewith (consultation report dated 22 September 2016, key point no. 2). Furthermore, FINMA expressly reserves the possibility to grant reliefs or be more restrictive in the individual case (note 8 of Circular 17/1).

b) Scope of Application of Circular 17/1

A significant change in Circular 17/1 vs. the current regulation is the shift from a "comply or explain" approach as currently applied in several areas to a consistently applied principle of proportionality. This allows FINMA to consider on a case-by-case basis the characteristics of each Bank in terms of size, complexity, structure and risk profile (note 8 of Circular 17/1). The principle of proportionality has mainly been implemented by differentiating between the different supervisory categories of Banks. Accordingly, more stringent requirements apply in certain areas for Banks in the supervisory categories 1-3 or for systemically relevant banks, whereas Banks in the supervisory categories 4 and 5 "only" have to fulfill the baseline requirements (see *e.g.* notes 31, 59 and 70 of Circular 17/1).

The reason for this shift is that the "comply or explain" approach, which is an established concept in self-regulatory regimes (*i.e.* institutions explaining non-compliance with certain requirements in their annual reports), is rare in the regulated space and has in practice rendered a timely supervision by FINMA difficult. FINMA also highlighted that it will consider granting exceptions in the future should it not be possible to meet the requirements of Circular 17/1 in a specific individual case for convincing reasons (explanatory report dated 1 March 2016, p. 10).

The provisions of Circular 17/1 on group structure have been aligned with international guidelines. Accordingly, the principles and provisions of Circular 17/1 for individual institutions will apply to financial groups and conglomerates by analogy, which largely aligns with current FINMA practice (note 98 of Circular 17/1). In particular, financial groups and conglomerates must implement rules on the tasks and responsibilities of the various bodies being responsible for the group management.

c) Modifications relating to the Responsibilities and Requirements for the Governing Body

Circular 17/1 uses the more general term "governing body" (*Oberleitungsorgan*) that, in principle, applies to all types of legal entities including *e.g.* companies limited by shares (*AG*) and cooperatives (*Genossenschaften*) as opposed to the term "board of directors" as referred to in circular 2008/24 that mainly refers to companies limited by shares in the meaning of article 620 et seq. CO.

The governing body must play an active role in strategic matters of a Bank (see as well the corporate law provisions on the non-transferable and unalienable competences of the board of directors in article 716a CO). Accordingly, Circular 17/1 contains a list of minimum required tasks and responsibilities for a Bank's governing body, including the approval of the business strategy and risk policies. In this context, the governing body is responsible for the approval of the risk framework as well as the regulation, implementation and monitoring of an appropriate risk management and overall risk steering (note 10 of Circular 17/1). Besides such controlling aspects, Circular 17/1 will implement principles and structures for the governing body relating to the management of the Bank (so-called "checks and balances"), particularly in the areas of organization, accounting and the selection of candidates in key positions (notes 11-14 of Circular 17/1). The rather generic description of such activities corresponds with international standards (see *e.g.* principle no. 1 of the BCBS Corporate Governance Principles) and remains to a large extent in line with the current FINMA FAQ on the Governing Body. Finally, the governing body has to decide on important changes of the entity (and group) structure and investments of a strategic importance (note 15 of Circular 17/1). Interestingly, under the provisions of the draft circular 2016/xx "Corporate Governance – banks" published on 1 March 2016 (Draft Circular 17/1) the governing body had a *general* responsibility to decide on changes to the entity (and group) structure (note 17 of Draft Circular 17/1). In contrast, under Circular 17/1, the governing body only has to decide on *important* changes of the entity (and group) structure. This sensible adjustment allows for more flexibility in delegating tasks.

The provisions of Circular 17/1 on the composition of the governing body are largely similar to the current rules of the FAQ on the Governing Body and the provisions of the circular 2008/24. *E.g.* the requirement that at least one third of the board members must be independent will continue to apply. However, FINMA may in justified exceptional cases grant exceptions (note 17 of Circular 17/1). This might in particular be relevant in financial groups. Similarly to the current regime, a member of the governing body is deemed to be independent if he/she cumulatively fulfills at least the following criteria (notes 18-22 of Circular 17/1):

- is not engaging in any other function in the institution or has not been engaged in such function in the last 2 years;
- has not been employed as the responsible lead auditor of the financial institutions audit company within the last 2 years;
- does not maintain a business relationship with the financial institution of a type or scope which may lead to a conflict of interests; and
- is not a qualified shareholder in the meaning of article 3 (2) (c^{bis}) Banking Act and article 10 (2) (d) Stock Exchange Act and also does not represent such a person.

The Draft Circular 17/1 envisaged that a *significant part* of the members of the governing body could not be (or represent) a qualified shareholder of the financial institution. In Circular 17/1, however, this requirement has been eased to the extent that it only has to be fulfilled by at least one third of the board members.

Under Circular 17/1, Banks in the supervisory categories 1-3 are required to establish an audit and a risk committee, irrespective of the total number of members of the governing board (note 31 of Circular 17/1). Under former FINMA practice, a Bank was only allowed to create a committee if the governing body consisted in total of at least five members (see Susan Emmenegger/Hansueli Geiger, Bank-Aktiengesellschaft – Statuten und Reglemente mit Mustern, Zurich/Basel/Geneva 2004, N 145).

The tasks and responsibilities of the committees correspond to a large extent to international standards, in particular principle no. 3 of the BCBS Corporate Governance Principles. Consequently, the responsibilities of the *audit committee* mainly relate to monitoring and evaluation tasks, *e.g.* regarding the financial reporting, the internal control and compliance functions, the risk control as well as the independence and effectiveness of the external auditor (notes 34-39 of Circular 17/1). The tasks of the *risk committee*, in contrast, refer to the framework concept for the entity (or group) wide risk management, the evalution of the capital and liquidity planning as well as the general control over an appropriate risk management and risk strategy (notes 40-46 of Circular 17/1). Under Draft Circular 17/1, it was envisaged that Banks in the supervisory categories 1-3 had to create *separately* an audit committee and a risk committee (note 36 of Draft Circular 17/1). In contrast, the finalized Circular 17/1 requires this only for Banks in the supervisory categories 1 and 2 (note 31 of Circular 17/1). Accordingly, Banks in the supervisory category 3 may have a combined audit and risk committee. The majority of the members of the audit and the risk committee have to be independent in the meaning set forth above, but not mandatorily independent from the nomination committee as previously proposed in Draft Circular 17/1 (note 33 of Circular 17/1 and note 38 of Draft Circular 17/1).

d) Modifications relating to the Responsibilities and Requirements on the Management Body

Circular 17/1 defines minimum tasks and responsibilities of the management body and minimum requirements for its members which are largely in line with international standards, in particular the BCBS Corporate Governance Principles. Besides the operation of the daily business, the management body is responsible for the implementation of adequate internal systems such as the management information system (MIS), the internal control system and a suitable technology infrastructure (notes 47-50 of Circular 17/1). These management responsibilities have been adopted from circular 2008/24 (notes 80 et seq.) and circular 2008/21 (notes 122-123).

Although not expressly mentioned in Circular 17/1 (other than in the Draft Circular 17/1), the management body is, in our understanding, responsible for the monitoring of the compatibility of the business activities with the law and internal rules.

e) Modifications relating to the Risk Concept

Circular 17/1 provides for a duty to implement and manage a framework concept for the entity (and group) wide risk management which has been adopted from the circular 2008/21. Newly, FINMA explicitly requires such framework concept to be prepared by the management body and approved by the governing body (whereas before circular 2008/21 only referred to the requirement of approval by the governing body). Such framework concept has to include certain minimum standards addressing risk policy, risk appetite and risk limits of the respective institution (notes 53 et seq. of Circular 17/1).

Banks in the supervisory categories 1-3 have to include in their framework concept provisions referring to the risk data aggregation and reporting (*Risikodatenaggregation und –berichterstattung*), not only systemically relevant banks as it was initially envisaged in the Draft Circular 17/1. Systemically relevant banks are, however, required to certain additional specifications in their risk data aggregation rules (note 59 of Circular 17/1). FINMA included transitional provisions for the implementation of the respective rules: Banks in the supervisory categories 1-3 have to implement such provisions on risk data within a one year transitional period (note 103 of Circular 17/1). Systemically relevant banks, however, have to implement the additional requirements already at the time of the entry into force of the circular or within a three year transitional period upon classification as systemically relevant bank (note 105 of Circular 17/1).

As widely criticised by the participants in the consultation procedure for the Draft Circular 17/1 (*e.g.* by Postfinance AG or the University of St. Gallen), the existing regulation lacked a proper definition of the term "risk management" and its distinction from "risk control". Unfortunately, Circular 17/1 does neither define the term nor otherwise bring more clarity in this regard.

f) Modifications relating to the Internal Control System and the Internal Audit

Circular 17/1 envisages a holistic concept of an internal control system (ICS) in line with international guidelines, such as the ISO 31000 rules on Risk management, comprising at least the performance-oriented business units and independent supervisory bodies (note 60 of Circular 17/1). Furthermore, Circular 17/1 requires Banks in the supervisory categories 1-3 to implement the role of an independent chief risk officer (CRO), who has to be a member of the management body if the Bank is systemically relevant. Such CRO may be responsible also for other independent control functions (*e.g.* for the compliance function) even in case of systemically relevant banks (notes 67

and 68 of Circular 17/1). In Draft Circular 17/1, a more restrictive approach was suggested as it required the CRO to be exclusively responsible for the risk control function.

Besides a semiannual report to the management body and an annual report to the governing body, the risk control function has to timely inform the management on special developments and, more extensively than under the current regime in circular 2008/24, in important cases, also the governing body (notes 75 and 76 of Circular 17/1).

Circular 17/1 adopts the detailed provisions refering to the implementation of an internal audit function from the circular 2008/24 almost *verbatim*. However, under the current regime, FINMA may in exceptional cases exempt a Bank from the requirement to implement an internal audit function (note 55 of circular 2008/24). Under Circular 17/1, no such explicit exemption option is envisaged. Similar to the current regime, in circumstances where the establishment of an institution-specific internal audit function appears to be inadequate (*e.g.* because of the small size of the Bank), the Bank may delegate the internal audit duties to i) the internal audit function of its parent company or of another group company, if this company is also a bank, a securities dealer or another supervised financial institution (*e.g.* and insurance company), ii) a second audit firm which is independent from the institution's audit firm or iii) another group company or an independent third party, if the auditors confirm the professional capabilities and avaiability of appropriate technical and human resources (notes 83-86 of Circular 17/1). Extending the previous regime, Circular 17/1 in above iii) now also allows a delegation of the internal audit function to another (unregulated) group company, subject to the above confirmations by the auditors. This is particularly relevant if a Bank intends to outsource its internal audit function to *e.g.* an unregulated group internal service company. Considering the recent trend of financial institutions to implement a service company structure, this amendment is a sensible response to this trend.

Circular 17/1 provides for several minimum requirements on the remit of the internal audit. The requirement to prepare a multi-year plan for all risk relevant business activities which was contemplated in the Draft Circular 17/1 has not been adopted in Circular 17/1.

g) No Adoption of Provisions relating to Disclosure Duties

Draft Circular 17/1 envisaged to impose extended public disclosure obligations on Banks in the supervisory categories 1-3 similar to the corporate governance guidelines of the SIX. Such disclosure duties would have referred to information *e.g.* on the internal organization and functioning of the governing and the management body as well as vested interests of the members of the governing and the management body.

During the consultation period, the participants (such as UBS AG or the Verband Schweizerischer Kantonalbanken) questioned the legal basis for such disclosure duties and whether Circular 17/1 is the appropriate place for such disclosure rules. In response to this criticism, the entire chapter on disclosure requirements has not been included in Circular 17/1 but has been moved (in a reduced fashion) to the revised circular 2016/1 "disclosure – banks" which was published on 19 December 2016 and entered into force on 1 January 2017.

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Stay Recognition Clauses in Financial Contracts

Reference: CapLaw-2017-18

On 16 March 2017, the Swiss Financial Market Supervisory Authority FINMA (FINMA) released final rules on stay recognition clauses in financial contracts that are governed by non-Swiss law and/or subject to the jurisdiction of non-Swiss courts. The new rules are set out in an amendment to the Ordinance of FINMA on the Insolvency of Banks and Securities Dealers (BIO-FINMA) and aim to implement and further specify the scope of the obligation for banks to include stay recognition clauses in financial contracts as provided for in article 12(2bis) of the Ordinance on Banks and Savings Institutions (FBO). The final rules took effect on 1 April 2017, with a 12 months implementation period for contracts with banks and securities dealers and an 18 months implementation period for contracts with all other counterparties.

By Stefan Kramer / Andreas Josuran

1) Background of the New Rules

The global financial crisis of 2007-2009 illustrated that contagion and interconnectedness among financial market participants may pose systemic risks and endanger the proper functioning of the financial markets in a crisis. Financial contracts providing for default clauses referring to external events (such as cross-default clauses or clauses referring to the exercise of resolution powers by the regulator) are one potential cause of such interconnectedness. Against this background, article 30a of the Act on Banks and Savings Institutions (FBA) introduced the power of FINMA to order a stay (a Stay) in connection with the exercise of its resolution powers for up to two business days. The Stay temporarily overrides termination and related contractual rights (*e.g.*, close-out netting provisions) which would otherwise be triggered as a result of protective measures or restructuring proceedings being implemented with respect to an entity that is subject to FINMA's resolution powers (the Resolution Entity).

On 1 January 2016, a new rule was introduced in the Swiss Banking Ordinance (article 12(2bis)) requiring banks and group companies to include stay recognition clauses in financial contracts. The main purpose of this obligation is to ensure enforceability of a Stay imposed by FINMA with respect to transactions governed by third-country law (*e.g.*, derivatives and repo transactions under ISDA or GMRA master agreements, which are generally governed by English or New York law), thereby ensuring that resolution actions taken in relation to a Swiss Resolution Entity would not immediately lead to the early termination of its financial arrangements (or those of its subsidiaries).

The rules are part of a coordinated effort of the Financial Stability Board (FSB) to improve cross-border recognition of resolution stays by obliging firms to adopt contractual solutions where statutory recognition regimes are lacking. The Swiss rules closely track similar obligations that were recently introduced by the Prudential Regulation Authority (PRA) in the United Kingdom.

2) Scope of Obligation to Amend Financial Contracts

a) In-scope Contracts

The scope of the obligation to amend financial contracts is closely linked to the scope of a FINMA's stay powers. If a Stay cannot apply to a specific contract, for instance because it does not contain termination provisions or related contractual rights (*i.e.*, set-off, netting, collateral enforcement and porting rights) which would otherwise be triggered as a result of protective measures or resolution proceedings being imposed by FINMA (collectively, Relevant Termination Rights), there is no obligation to include a stay recognition clause into such contract.

Furthermore, the obligation to amend contracts only applies to newly concluded or amended contracts (see below under 3 a) "Newly concluded or amended contracts").

Pursuant to article 56(1) BIO-FINMA, the following types of contracts are generally in scope (subject to the exemptions described below under 2 b) "Available Exemptions"):

– lit. a: contracts for the purchase, sale, lending or repurchase relating to securities and corresponding transactions with respect to indices containing these underlying assets, as well as options in relation to such underlying assets;

  FINMA in its report of 9 March 2017 on the results of the consultation process (the Consultation Report) states that, in light of the general scope of the rules, spot transactions and similar transactions with a very short term (*i.e.,* intraday and overnight transactions) do generally not need to be amended. This appears to be justified given that, firstly, such transactions typically do not provide for Relevant Termination Rights and do therefore not fall within the scope of application (see above)

and, secondly, even if in specific cases they did contain Relevant Termination Rights, a Stay would in any case have little to no effect on such transactions.

– lit. b: contracts for the purchase and sale with future delivery, lending or repurchase relating to commodities and corresponding transactions with respect to indices containing these underlying assets, as well as options in relation to such underlying assets;

– lit. c: contracts for the purchase, sale or transfer of commodities, services, rights or interest at a future date and at a predetermined price (futures contracts);

  In the EU, the obligation to amend contracts is generally limited to financial contracts (see article 2 no. 100 of the Directive 2014/59/EU (BRRD)). With respect to the Swiss rules, it is not entirely clear from FINMA's Consultation Report to what extent contracts that are unrelated to financial market transactions would be out of scope. However, contracts providing for the sale or purchase of services, IT, real estate etc. will in any way not need to be amended if they do not provide for Relevant Termination Rights.

– lit. d: swaps, including credit derivatives and interest options;

– lit. e: inter-bank loans;

  Contrary to the rules in the EU (see article 2 no. 100(e) BRRD), under which the obligation to amend contracts generally only applies to inter-bank loan agreements with a duration of up to three months, Swiss law does not make this distinction.

– lit. f: other contracts with the same effect as the ones above;

  In its Consultation Report, FINMA makes it clear that this "catch-all provision" is not intended to broaden the scope of application. Rather, it aims to prevent circumvention of the new rules and to avoid loopholes as regards future developments in the market. It would therefore in our view not be sufficient if a contract (*e.g.*, an insurance contract) has a similar economic effect as an in-scope contract (*e.g.*, a credit default swap). Rather, a transaction would have to be documented specifically with a view to circumvent the obligations under the BIO-FINMA in order to fall under the "catch-all" provision.

– lit. g: contracts as the ones above in the form of a master agreement.

  Contracts can be in scope irrespective of whether they are documented as a standalone transaction or entered into under a master agreement.

b) Available Exemptions

According to article 56(1)(h) BIO-FINMA, contracts of foreign affiliates do not need to be amended, unless performance of the affiliate's obligations under the contract is secured by a Swiss bank or securities dealer.

If not the Resolution Entity itself but a foreign affiliate of the Resolution Entity is a party to a relevant contract that includes Relevant Termination Rights, a Stay imposed by FINMA will only be effective, and a stay recognition clause will only have to be included in the contract, if there is a sufficient connection to the Swiss resolution proceedings. As regards customary derivatives and repo master agreements, an obligation to amend a contract would therefore only exist if the Resolution Entity cumulatively (i) is named as "credit support provider" or "specified entity" (or an equivalent) in the relevant contract, and (ii) guarantees or otherwise secures the performance of the relevant foreign affiliate under such contract.

Furthermore, pursuant to article 56(2) BIO-FINMA, the following types of contracts are out of scope even if they would otherwise fall into one of the categories described above:

– lit. a: contracts that do not provide for Relevant Termination Rights;

  This already follows from the general principle that an obligation to amend contracts only exists to the extent the relevant contract can potentially be subject to a Stay (see above under "In-scope Contracts"). Accordingly, contracts only providing for other termination rights (*e.g.*, a right to terminate at will) do not need to be amended.

– lit. b: contracts that are concluded or settled directly or indirectly via a financial market infrastructure or an organized trading facility (OTF);

  This exemption captures contracts concluded or cleared via a financial market infrastructure pursuant to article 2(a) Act on Financial Market Infrastructures (FMIA) or an organized trading facility pursuant to article 42 FMIA. In addition, FINMA clarifies in its Consultation Report that the exemption also applies to contracts concluded on foreign trading platforms regardless of their qualification in the relevant home country jurisdiction (such as, for example, securities exchange facilities (SEFs) qualifying as "trading venues" within the meaning of Directive 2014/65/EU (MIFID II)). Not within the scope of this exemption are, however, contracts concluded via foreign facilities that only serve the purpose of bilateral trading (and do therefore not count as organized trading facilities under MIFID II), such as systematic internalizers.

– lit. c: contracts with central banks;

– lit. d: contracts of group entities which are not active in the financial sector;

– lit. e: contracts with natural persons;

  This exemption applies to contracts with individuals and other counterparties that are not enterprises within the meaning of article 77 of the Ordinance on Financial Market Infrastructures (FMIO). Requiring for such contracts to be amended to include a stay recognition clause would not be proportionate, given the significantly lower systemic relevance of such transactions. Pursuant to FINMA's Consultation Report, contracts entered into by ultra-high net worth individuals may need to be amended if they are concluded through investment structures such as trusts or family offices.

– lit. f: contracts relating to the placement of financial instruments in the market.

  This exemption applies to subscription agreements, underwriting agreements and similar contracts for the purchase and/or placement of financial instruments in the market. Such contracts commonly include termination clauses, in particular upon the occurrence of a material adverse change of the financial or legal position of the issuer.

3) Further Conditions

a) Newly Concluded or Amended Contracts

Only contracts that are newly concluded or actively amended by the parties thereto are in scope. Existing contracts do therefore generally not need to be amended. Also, an obligation to include a stay recognition clause is not triggered in case an amendment is effected by operation of the contractual terms, such as, *e.g.*, the resetting of interest rates (article 56(2)(g) BIO-FINMA).

According to the Consultation Report, the entering into a new transaction under an existing master agreement is also considered an amendment which would trigger the obligation to include a stay recognition clause. Moreover, contrary to the rules enacted by the PRA for banks in the UK, the Swiss rules do not provide for a general exemption for amendments that are not material. Rather, FINMA's Consultation Report states that no distinction should be made between material and non-material amendments.

b) Non-Swiss Governing Law or Jurisdiction of Non-Swiss Courts

In line with the general goal to improve cross-border recognition of resolution stays by obliging firms to adopt contractual solutions where statutory recognition regimes are lacking, only contracts that are either governed by non-Swiss law and/or subject to the jurisdiction of non-Swiss courts are in scope. Conversely, contracts that are governed by Swiss law and subject to the jurisdiction of Swiss courts do not need to be amended (article 12(2bis) FBO).

4) Implementation

a) Timeline

The new rules took effect on 1 April 2017 with a 12 months implementation period for contracts with banks and securities dealers and an 18 months implementation period for contracts with all other counterparties. Accordingly, the regulation will apply to contracts with banks and securities dealers as of 1 April 2018 and it will apply to contracts with other counterparties as of 1 October 2018.

b) How to Implement

Compliance is expected to be established primarily by way of the ISDA Resolution Stay Jurisdictional Modular Protocol together with a specific Swiss Module which is in the course of being prepared by ISDA. Adherence to the Jurisdictional Modular Protocol results in counterparties to financial institutions consenting to "opt in" to stays on, or overrides of, certain termination rights under specific resolution regimes, notwithstanding the governing law of their agreements. Accordingly, if both parties to a contract adhere to the Jurisdictional Modular Protocol and the respective Swiss Module, in-scope contracts (including future contracts if a reference to the Jurisdictional Module is incorporated in the terms of the agreement) are automatically amended to include the relevant resolution stay recognition clauses.

Contracts that are not covered by a protocol will not automatically include a stay recognition clause. To the extent such contracts fall into the scope of the obligation to include stay recognition clauses, parties will have to include such a clause on a bilateral basis.

5) Conclusion and Outlook

Swiss banks will have to comply with the obligation to amend newly concluded or amended contracts (i) by 1 April 2018 for contracts with banks and securities dealers as counterparties and (ii) by 1 October 2018 for contracts with other counterparties. ISDA have communicated earlier that they expect the preparation of the aforementioned Swiss Module to take three to six months.

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Launch of New Mortgage Fund

Reference: CapLaw-2017-19

Credit Suisse launched a new mortgage fund "Swiss Mortgage Fund I" (the Fund) which is authorised by the Swiss Financial Market Supervisory Authority FINMA and managed by independent asset manager Tavis Capital AG. Credit Suisse (Schweiz) AG will periodically offer mortgage loans which match a set of pre-defined criteria to the Fund. Tavis then selects the mortgages in which the Fund will invest according to the Fund's investment strategy. The innovative structure involving a combination of sub-participation and assignment of the so selected mortgage loans to the Fund allows Credit Suisse (Schweiz) AG to transfer the risks and returns of the mortgages, thereby relieving its balance sheet and allowing for more flexibility in respect of the management of its capital base.

Acquisition of Opel and Vauxhall businesses by PSA

Reference: CapLaw-2017-20

Groupe PSA (PSA) and General Motors Co. (GM) announced an agreement under which PSA will acquire GM's Opel and Vauxhall businesses in a transaction valuing at EUR 1.3 bn. Furthermore, PSA together with BNP Paribas will acquire GM Financial's European operations valuing these activities at EUR 900m through a newly formed 50%/50% joint venture. Upon the closing of this transaction, PSA will become the second-largest automotive company in Europe, with a market share of 17%. Closing is currently expected to take place prior to the end of 2017.

Merger of private equity businesses of Unigestion and Akina

Reference: CapLaw-2017-21

Unigestion and Akina have announced their decision to merge their private equity businesses to create a leading specialist in global small and mid-market private equity. With USD 6 billion in assets under management and 54 dedicated professionals located in Geneva, Zurich, London, New York and Singapore, the combined business will trade under the Unigestion name. Completion of the transaction is subject to the customary regulatory approvals.

14. Zürcher Aktienrechtstagung: Das neue Schweizer Aktienrecht kommt

Friday, 7 April 2017, Park Hyatt Zürich, Beethoven-Strasse 21, Zurich

http://www.eiz.uzh.ch/uploads/tx_seminars/Programm_Aktienrecht_07.04.2017_.pdf

Aktuelles zum Kollektivanlagenrecht IV

Thursday, 18 May 2017, Kongresshaus Zürich, Gotthardstrasse 5, Zurich

https://www.schulthess.com/download/Programm_Kollektivanlagenrecht_18.05.2017.pdf?FILE=339M4KXJSXRR.pdf

14. Tagung zu Entwicklungen im Finanzmarktrecht

Tuesday, 30 May 2017, Lake Side Casino Zürichhorn, Zurich

http://www.eiz.uzh.ch/uploads/tx_seminars/Programm_Finanzmarktrecht_30.05.2017_01.pdf